Supreme Court, U.S.
FILED

No. ____

94 484 SEP 14 1994

IN THE

SUPREME COURT OF THE UNITED STATES

CLERK

October Term, 1994

RICHARD FLECK and DIANE FLECK,
Petitioners

v.

HOFFINGER INDUSTRIES, INC.;
DOUGHBOY RECREATIONAL, INC.,
Defendants and Third-Party Plaintiffs

v.

KDI SYLVAN POOLS, INC., a/k/a SYLVAN POOLS;
JAMES HUBERT; POSEIDON POOLS OF AMERICA, INC.;
GIBRALTAR CORP. OF AMERICA, formerly
GIBRALTAR FACTORS CORP.; S & V POOLS, INC.,
Third-Party Defendants

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In a suit against the manufacturer of a liner for a swimming pool in which plaintiff Richard Fleck dove and suffered quadriplegic injuries, did not the court below err when it entered summary judgment for defendants against plaintiffs on the ground that plaintiffs should be "penalized" for not suing defendants in a prior lawsuit that plaintiffs brought against others arising out of the accident, where:

(a) Federal Rule of Civil Procedure 20 provides for a "permissive" joinder of parties defendant, not a mandatory joinder; and

(b) the ruling of the court below conflicts with the Supreme Court's recent opinion in *Temple v. Synthes Corporation Ltd.*, 498 U.S. 5, 111 S.Ct. 315, 112 L.Ed. 2d 263 (1990).

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Authorities	iii
Opinions Below	1
Grounds for Jurisdiction	2
Federal Rules of Civil Procedure 19 and 20	2
Statement of the Case	3
Argument	4
Conclusion	8
Appendix:	
Opinion of District Court	A-1
Order of District Court	A-8
Judgment Order of Court of Appeals	A-9

TABLE OF AUTHORITIES

Cases: Page

Crispin v. Volkswagonwerk, A.G. (1984) 96 N.J. 336, 476 A.2d 250 6

Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107 (3d Cir. 1992) 4

Provident Bank & Trust Co. v. Patterson (1968) 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed.2d 936 .. 4, 5

Temple v. Synthes Corporation Ltd. (1990) 498 U.S. 5, 111 S.Ct. 315, 112 L.Ed.2d 263 .. i, 4, 6, 8

Walton v. Avco Corp. (1992) 530 Pa. 568, 610 A.2d 454 6

Statutes:

11 U.S.C. §362 4

28 U.S.C. §1254 2

28 U.S.C. §1291 4

28 U.S.C. §1332 4

Federal Rules of Civil Procedure:

Rule 19 ..... 2, 8

Rule 20 ..... i, 3, 5, 8

Law Review Article:

12 Seton Hall Law Review 260 7

No.____

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GIBRALTAR FACTORS CORP.; S & V POOLS, INC.,
Third-Party Defendants

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion and order of the District Court are included herein at Appendix A1-A8. The judgment order of the U.S. Court of Appeals for the Third Circuit is included herein at Appendix A9-A10.

These opinions do not appear in the West Reporters.

GROUNDS FOR JURISDICTION

The Amended Judgment Order of the U.S. Court of Appeals for the Third Circuit was entered on June 22, 1994.

Jurisdiction of the Supreme Court to review this judgment order by writ of certiorari is conferred by 28 U.S.C. §1254.

FEDERAL RULES OF CIVIL PROCEDURE

Federal Rule of Civil Procedure 19, provides, in pertinent part:

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) **Persons to be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the persons's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

Federal Rule of Civil Procedure 20 provides, in pertinent part:

> **Rule 20. Permissive Joinder of Parties**
>
> (a) **Permissive Joinder.** All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) *may* be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities. [Emphasis supplied.]

STATEMENT OF CASE

On August 8, 1987, in the early evening, Richard Fleck, then 23 years old, dove into an above-ground swimming pool located on the premises of third party defendant James Hubert in West Chester, Pennsylvania, broke his neck, and became a quadriplegic. Defendants (hereinafter referred to as "Hoffinger") manufactured the liner that covered the bottom and sides of the pool at the time of the accident. There were no depth markers or warnings on the liner.

No trial was held in the instant case because the trial judge granted summary judgment to defendant

Hoffinger on the ground that plaintiffs should be "penalized" for not having sued Hoffinger directly in a prior lawsuit that they filed against other parties arising out of the accident. The trial judge said that the appropriate penalty was to grant summary judgment for Hoffinger against the plaintiffs, and he did so. Appendix, A1-A9.

In the prior lawsuit, a jury awarded Richard Fleck $10,000,000 for his injuries, and Diane Fleck $250,000 for her loss of consortium, but they were able to collect less than twenty percent of their verdicts because the culpable defendant in that case (Nichols Swim Pools, Inc.) went bankrupt prior to trial (for unrelated reasons), and plaintiffs had to limit their claims against it to the amount of its liability insurance coverage in order to have the automatic stay of the Bankruptcy Code lifted (11 U.S.C. §362). See *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107 (3d Cir. 1992).

Jurisdiction in the district court was based upon diversity of citizenship and amount in controversy, pursuant to 28 U.S.C. §1332.

Jurisdiction in the United States Court of Appeals for the Third Circuit was based upon 28 U.S.C. §1291.

ARGUMENT

THE COURTS BELOW ERRED IN HOLDING THAT PLAINTIFFS SHOULD BE PENALIZED FOR NOT SUING DEFENDANT HOFFINGER DIRECTLY IN A PRIOR LAWSUIT, AND THAT THE PENALTY SHOULD BE DISMISSAL OF THEIR CASE.

In a diversity case the question of joinder is one of federal law. *Provident Bank & Trust Co. v. Patterson* (1968) 390 U.S. 102, 125 (f.n. 22), 88 S.Ct. 733, 19 L.Ed.2d 936.

Federal Rule of Civil Procedure 19(a) describes "persons to be joined if feasible." Hoffinger does not fit the criteria set forth in the rule. See *Temple v. Synthes Corporation Ltd.* (1990) 498 U.S. 5, 111 S.Ct. 315, 112

L.Ed.2d 263. Even if it did, the remedy should have been insistence in the prior case that Hoffinger be joined as a direct defendant or dismissal of that case. See *Provident Bank & Trust Co. v. Patterson*, supra.

Plaintiffs did not sue Hoffinger directly in the prior case because (1) when they instituted that lawsuit they did not know that Hoffinger manufactured the liner; (2) after they instituted that lawsuit, co-defendant Nichols, the retailer of the liner, joined S.K. Plastics, Inc. as a third party defendant, alleging that it was the manufacturer of the liner, and (3) though counsel for Nichols informed counsel for plaintiffs shortly before the running of the statute of limitations on August 8, 1989, that Hoffinger might be the manufacturer, it did not then dismiss S.K. Plastics, Inc. as a third party defendant. It did not do so and did not obtain permission to join Hoffinger as a third party defendant until August 21, 1989, after the statute of limitations had already run on the plaintiffs.

(However, Hoffinger, once it had been joined as a third party defendant, could have removed to federal court the savings action that plaintiffs had instituted against it by summons in Pennsylvania state court. Robert Korn, Esq., who represented Hoffinger in the prior case in federal court, also entered his appearance for Hoffinger in the state court action. Hoffinger could also have agreed to waive the statute of limitations so that plaintiffs could move to join it directly in the federal court action. It did neither.)

Though Hoffinger was sued in the prior case as a third party defendant, not a direct defendant, it nevertheless had opportunity to contest and litigate all of the claims made by plaintiffs that could have an adverse effect upon it. Hoffinger did so, and plaintiffs won. Appendix, A-5.

Joinder of defendants who are jointly and severally liable to the plaintiff in a tort action is permissive, not mandatory, in the federal courts. Federal Rule of Civil Procedure 20.

In *Temple v. Synthes Corporation Ltd.* (1990) 498 U.S. 5, 111 S.Ct. 315, 112 L.Ed.2d 263, a patient who was injured when surgical screws broke in his back sued the manufacturer in a federal district court. He sued the doctor and the hospital involved in a Louisiana state court. The federal court ordered him to join the doctor and the hospital in the federal lawsuit, and, when he failed to do so, dismissed his case. The Fifth Circuit affirmed, opining that joinder of defendants was required in the interests of judicial economy. The Supreme Court reversed, per curiam, explaining that in the federal courts defendants who are jointly and severally liable to the plaintiff in a tort action are subject to permissive joinder, not mandatory joinder.

Under Pennsylvania substantive law, which applies in the instant case, two tortfeasors who are strictly liable to a plaintiff for sale of a defective product are joint tortfeasors who are severally and jointly liable to the plaintiff. *Walton v. Avco Corp.* (1992) 530 Pa. 568, 610 A.2d 454.

What the court below did, in effect, is adopt for the Third Circuit New Jersey's eccentric "entire controversy doctrine." In *Crispin v. Volkswagonwerk, A.G.* (1984) 96 N.J. 336, 476 A.2d 250, 253-254, the New Jersey Supreme Court promulgated a new judicial doctrine that would bar a plaintiff from asserting a claim against one whom plaintiff had not joined as a party defendant in a prior related proceeding. It did this *prospectively* to avoid penalizing the plaintiff, who had relied on longstanding prior law. In the instant case the court below adopted this judicial doctrine *retroactively*, thus enabling it to "penalize" the Flecks, who also had relied on longstanding prior law.

This was wrong because New Jersey's "entire controversy doctrine" is not the law in the federal courts, and conflicts with the law enunciated by the United States Supreme Court in *Temple v. Synthes Corp., Ltd.* (1990) 498 U.S. 5, 111 S.Ct. 315, 112 L.Ed.2d 263. (It is not the law of Pennsylvania, either. It is apparently a

peculiar minority view espoused by the New Jersey Supreme Court. See Comment, *The Entire Controversy Doctrine: A Novel Approach to Judicial Efficiency*, 12 Seton Hall Law Review 260, 287.)

The rulings of the courts below not only violate the law promulgated by the United States Supreme Court in the *Temple* case, supra, but also violate fundamental principles of justice and fair play. The courts below, in effect, changed the rules of the game in order to deprive a young, permanently quadriplegic plaintiff of his day in court against the manufacturer of a product that a jury in a previous case had found, after a full and fair trial, to be defective and responsible for his injuries.

Richard Fleck has received less than twenty percent of what the jury found to be reasonable compensation for his injuries because the defendant found liable in the first trial declared bankruptcy (for reasons unrelated to his lawsuit) and had limited liability insurance coverage. He is now being deprived of any opportunity to obtain part of the remaining eighty percent of the damages to which a jury found that he was entitled, because the courts below changed the rules on him, without warning, and then "punished" him for not anticipating the change.

CONCLUSION

Plaintiffs request the Court to grant their petition for a writ of certiorari, and to overrule the decisions of the courts below because they conflict with Federal Rules of Civil Procedure 19 and 20 and applicable case law from the United States Supreme Court, i.e., *Temple v. Synthes Corp., Ltd.* (1990) 498 U.S. 5, 111 S.Ct. 315, 112 L.Ed.2d 263.

Respectfully submitted,

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Richard Fleck and
Diane Fleck

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD FLECK and DIANE FLECK, *Plaintiffs,*	:	
v.	:	
HOFFINGER INDUSTRIES, INC. and DOUGHBOY RECREATIONAL, INC., *Defendants,*	:	CIVIL ACTION NO. 91-5089
and	:	
JAMES HUBERT, *Third Party Defendant.*	:	

MEMORANDUM

BUCKWALTER, J. August 23, 1993

I. BACKGROUND

Plaintiffs filed a personal injury action against the defendants in the Court of Common Pleas of Philadelphia County (August Term, 1989 – No. 568) by a filing of a Writ of Summons on August 8, 1989. Subsequently, plaintiffs filed a complaint against defendants on July 12, 1991, which was removed to this court on August 8, 1991. In that complaint, plaintiffs allege that Richard Fleck was injured on or about August 8, 1987 when he dove from a wooden deck into an above ground swimming pool located at the home of James Hubert, and which above ground swimming pool contained a vinyl liner manufactured by Hoffinger and Doughboy which was defective because it did not contain adequate depth markers, warnings and/or instructions. In a prior civil action in this court (No. 89-1348), the plaintiffs had

ENTERED: 8/25/93

CLERK OF COURT

instituted a products liability action against KDI Sylvan Pools, Inc. a/k/a Sylvan Pools, Muskin, Inc., Nichols Swim Pools, Inc. and James Hubert based on a strict liability failure to warn theory arising out of the injuries sustained by Richard Fleck on August 8, 1987. In the 89-1348 action, the defendant Nichols Swim Pools, Inc. (hereafter Nichols), the seller of the replacement swimming pool liner that was in the pool at the time of Richard Fleck's accident, filed a third-party complaint against Doughboy Recreational, Inc., a division of Hoffinger Industries, Inc., the manufacturer of the replacement swimming pool liner, seeking indemnification for all damages which might be awarded in favor of the Flecks against Nichols.

Prior to trial in 89-1348, Nichols filed a petition for bankruptcy under Chapter 11 of the United States Bankruptcy Code. Thus, in order to proceed in 89-1348, the Flecks filed a petition to the Bankruptcy Court requesting relief from the automatic stay. Judge Twardowski granted the stay but provided that any verdict or judgment entered in favor of the Flecks against Nichols would be limited to the proceeds of applicable insurance available to Nichols. At the trial of 89-1348, the Flecks sole theory against Nichols was that the replacement pool liner sold by Nichols was a defective product because it did not contain any warning signs or depth markers. At that trial, counsel for the Flecks made a motion for leave to amend plaintiffs' complaint to allege negligence against Nichols as well as strict liability on the ground that Nichols was negligent in stopping its prior practice of handing out warnings when it sold products and failing to see that the original pool liner, which was replaced, did not have warnings on it, and in continuing not to put warnings on the swimming pools that it displayed. This motion was denied. Also during the trial of 89-1348, Nichols made a motion for a directed verdict with respect to its third party claim for indemnification against Hoffinger, which motion was granted.

At the conclusion of the trial in 89-1348, the jury found that the replacement swimming pool liner was defective and that the defect was a substantial factor in bringing about plaintiff's harm, and returned a verdict in favor of Richard Fleck in the amount of $10,000,000.00 and in favor of Diane Fleck in the amount of $250,000. On November 21, 1990, judgment was entered against Nichols and in favor of Richard Fleck in the amount of $11,750,000.00, and in favor Diane Fleck in the amount of $293,750.00, representing the verdict plus delay damages. Thereafter, on or about December 1991, the insurance carrier for Nichols tendered the amount of $2,092,513.00 representing the available proceeds of Nichols' insurance policies plus post-judgment interest to the date of settlement, and the Flecks accepted the tender and entered a partial satisfaction of judgment in favor of Richard Fleck to the extent of $2,040,200.20, and a partial satisfaction of the judgment in favor of Diane Fleck in the amount of $52,312.80.

Post-trial motions were filed by Hoffinger but denied by this court which resulted in Hoffinger's appeal to the Third circuit.

The Third Circuit affirmed this court's order except for the following errors:

> (1) The district court erred when it refused to award Nichols attorneys' fees and costs incurred in the underlying defense litigation and Nichols' indemnification action; and
>
> (2) The district court erred when it refused to reduce the jury verdict to an amount equal to the insurance proceeds available to Nichols.

With regard to those two matters, the case was remanded to this court for further proceedings as to the attorneys' fees and costs, and with instructions to mold the jury verdict to an amount equal to the insurance proceeds available.

On February 4, 1993, Hoffinger filed a petition for Writ of Certiorari to the United States Supreme Court which was denied.

As previously indicated in 89-1348, plaintiffs had a direct cause of action against Nichols, but had not filed a direct cause of action against Hoffinger. Nichols had the claim over against Hoffinger for indemnification. At the trial in 89-1348, Hoffinger and Nichols had identical interests in defending against plaintiffs' strict liability claim and plaintiffs' claim for damages. In fact, Hoffinger's attorney, Robert Korn, Esquire, in the words taken from plaintiffs' motion for summary judgment in this case, "took the laboring oar of the defense".

In this present action removed from state court, the Flecks' allegations against Hoffinger are the same allegations that they made against Nichols in the 89-1348 action; namely, that liner was defective, that the defect was a substantial factor causing the accident, and that as a result thereof, plaintiffs suffered damages. In the 89-1348 action, Hoffinger was both an active party defending against plaintiffs' claims and in privity with defendant Nichols. Hoffinger had a full and fair opportunity to litigate all the issues in question and availed itself of that opportunity. There is no genuine issue as to any material fact in the action now before the court that has not already been litigated by the present parties and decided in the prior action.

Based upon the foregoing, not surprisingly, both parties have filed motions for summary judgment. The plaintiffs argue that principles of collateral estoppel require the grant of their motion, while the defendants argue that by virtue of the doctrine of res judicata, the plaintiffs are barred from relitigating against Hoffinger and Doughboy in this case the same cause of action and/or same claims for damages asserted by them in 89-1348.

II. DISCUSSION

Although the parties to this summary judgment motion have frequently referred to the terms of res judicata and collateral estoppel, the preferred terms in recent years have been claim preclusion instead of res judicata, and issue preclusion instead of collateral estoppel. See *Wade v. City of Pittsburgh,* 765 F.2d 405 (1985), at p. 408.

Federal law of claim preclusion requires a defendant to demonstrate that there has been:

> (a) A final judgment on the merits in a prior suit;
>
> (b) That the prior suit involved the same parties or their privies; and
>
> (c) A subsequent suit between the same parties or their privies based on the same cause of action.

Lubrizol Corp. v. Exxon Corp., 929 F.2d 960 (3d Cir. 1991), citing *United States v. Athlone Indus., Inc.,* 746 F.2d 977, 983 (3d Cir. 1984). Applying that standard, it seems clear to me that there was a final judgment on the merits in the prior suit, 89-1348; that the prior suit involved the same parties or their privies, a finding agreed upon by the parties to this suit; and the subsequent suit, the one now before me, is based on the same cause of action as 89-1348.

While plaintiffs are in agreement with the general principal of law applicable to this case, in their brief filed in opposition to defendant's motion for summary judgment they contend that a second lawsuit even against the same defendant based on the same set of facts is not barred by res judicata when the monetary damages sought in the second lawsuit could not have been awarded to the plaintiffs in the first lawsuit. In support of this proposition, they cite the case of *Davidson v. Capuano,* (2d Cir. 1986) 792 F.2d 275. That case involved one in which the plaintiff had prevailed in a

state court proceeding brought under Article 78 of the New York Civil Practice Law and Rules in which he sought, in addition to having his prison records expunged of all reference to an earlier disciplinary proceeding, a reinstatement of his prisoner benefits and the return of property taken from his prison cell. He also sought in a proceeding under 42 U.S.C. 1983 to assert a similar claim but to seek only damages. In that case, the Second Circuit ruled that the bar against later claims based upon the same cause of action is subject to certain limitations, one of which is that it will not be applied if the initial forum did not have the power to award the full measure of relief sought in the later litigation. The court then concluded that under the state proceeding which the plaintiff had brought, he could not have received damages for civil rights violations.

The *Davidson* case differs from the one presently before the court in that this court always had the power to award the damages which plaintiff was seeking. The cap on those damages came as a result of plaintiff's unilateral action in seeking a stay of the bankruptcy proceedings so that it could proceed against Nichols.

Should plaintiffs be penalized for not proceeding directly against Hoffinger in 89-1348? I think the answer is Yes. As stated in *Wright, Miller & Cooper Federal Practice and Procedure: Jurisdiction Section 4412,* "It is clear enough that a litigant should not be penalized for failing to seek unified disposition of matters that could not have been combined in a single proceeding, and even clearer that no penalty should be inflicted if a deliberate effort to combine such matters has been expressly rejected" By contrast, however, there was nothing to prevent plaintiffs from combining the present action against Hoffinger with that brought against Nichols in 89-1348. Moreover, there was never any effort to reject the combining of this case with 89-1348.

The cause of action in this present case could have been directly raised and resolved against defendant in the prior proceeding. The doctrine of claim preclusion

precludes the relitigation of matters based on the same cause of action that were or could have been raised and resolved in a prior proceeding. See *Napier v. Thirty or More Unidentified Fed. Agents,* 855 F.2d 108 (3d Cir. 1988).

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD FLECK and DIANE FLECK, *Plaintiffs,*	:	
v.	:	
HOFFINGER INDUSTRIES, INC. and DOUGHBOY RECREATIONAL, INC., *Defendants,*	:	CIVIL ACTION
	:	NO. 91-5089
and	:	
JAMES HUBERT, *Third Party Defendant.*	:	

ORDER

AND NOW, this 23rd day of August, 1993, the order of this court dated June 14, 1993 denying defendants' motion for summary judgment is VACATED. Judgment is entered in favor of defendant Hoffinger Industries, Inc. and Doughboy Recreational, Inc., and against plaintiffs, Richard Fleck and Diane Fleck. On plaintiffs' motion for summary judgment (Document No. 38), said motion is DENIED.

IT IS SO ORDERED.

BY THE COURT:

RONALD L. BUCKWALTER, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-1902

RICHARD FLECK; DIANE FLECK,
Appellants

v.

HOFFINGER INDUSTRIES, INC.;
DOUGHBOY RECREATIONAL, INC.,
Third-Party Plaintiffs

v.

KDI SYLVAN POOLS, INC., a/k/a SYLVAN POOLS;
JAMES HUBERT; POSEIDON POOLS OF AMERICA, INC.;
GIBRALTAR CORP. OF AMERICA, formerly
GIBRALTAR FACTORS CORP.; S & V POOLS, INC.,
Third-Party Defendants

Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Civil Action No. 91-cv-05089
(Honorable Ronald L. Buckwalter)

Argued May 31, 1994

Before: SCIRICA, NYGAARD and ALDISERT,
Circuit Judges

AMENDED JUDGMENT ORDER*

---

*The Judgment Order entered June 13, 1994, is hereby vacated.

After consideration of all contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court entered August 25, 1993, be and is hereby AFFIRMED.

Costs taxed against appellants.

BY THE COURT,

Circuit Judge

Attest:

P. Douglas Sisk, Clerk

Costs taxed in favor of Hoffinger Industries & Doughboy Recreational:

Brief $140.52

Certified as a true copy and issued in lieu of a formal mandate on July 14, 1994

Teste:

Clerk, United States Court of Appeals for the Third Circuit

No. 94-484

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

RICHARD FLECK and DIANE FLECK,
Petitioners

v.

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Respondents

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GIBRALTAR CORP. OF AMERICA, formerly
GIBRALTAR FACTORS CORP.; S & V POOLS, INC.,
Respondents

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FOR RESPONDENTS, HOFFINGER INDUSTRIES, INC. AND DOUGHBOY RECREATIONAL, INC.

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BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

In a personal injury action against the manufacturers of a replacement liner for a swimming pool into which Plaintiff Richard Fleck dove and suffered injuries, did not the Courts below properly hold that the manufacturers of the liner were entitled to summary judgment under the doctrine of claim preclusion where there was a final judgment on the merits in a prior personal injury action brought by Plaintiff against the seller of the liner based upon the identical cause of action and making the same claims for damages, and the manufacturers of the liner, as Third-Party Defendants, were both parties to and privies to a party in the prior action?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 7

ARGUMENT 8

I. APPLYING THE DOCTRINE OF CLAIM PRECLUSION, THE COURTS BELOW PROPERLY HELD THAT THE FLECKS, BY VIRTUE OF THE ADJUDICATION AND REVISED JUDGMENT IN FLECK I, ARE BARRED FROM RELITIGATING AGAINST HOFFINGER AND DOUGHBOY IN THE WITHIN ACTION THE SAME CAUSE OF ACTION, AND/OR THE SAME CLAIMS FOR DAMAGES, ASSERTED BY THE FLECKS IN FLECK I.

II. THE SATISFACTION OF THE REVISED JUDGMENT OBTAINED BY THE FLECKS IN FLECK I AND THE "SINGLE SATISFACTION" RULE BAR THE FLECKS FROM PURSUING THE WITHIN ACTION AGAINST HOFFINGER AND DOUGHBOY.

CONCLUSION 18

TABLE OF AUTHORITIES

Cases — Page

Allen v. McCurry,
449 U.S. 90, 94, 101 S.Ct. 411, 414,
66 L.Ed. 2d 308 (1980) 10

Avins v. Moll,
610 F.Supp. 308 (E.D. Pa 1984), affirmed, 774 F.2d 1150 .... 11, 14

Bailey v. Harleysville Mut. Ins. Co.,
341 Pa. Super. 420, 491 A.2d 888 (1985) 10

Bearoff v. Bearoff Brothers, Inc.,
458 Pa. 494, 327 A.2d 72 (1974) 10

Brandt v. Eagle,
412 Pa. Super. 171, 602 A.2d 1364 (1992),
alloc. den., 615 A.2d 1370 16

Brown v. Felsen,
442 U.S. 127, 131, 99 S.Ct. 2205, 2209,
60 L.Ed. 2d 767 (1979) 11

Brown v. Pittsburgh,
409 Pa. 357, 186 A.2d 399 (1962) 16

Bruszewski v. United States,
181 F.2d 419 (3rd Cir. 1950), cert. den.,
340 U.S. 865, 71 S. Ct. 87, 95 L.Ed. 632 (1950) 10, 11, 12, 14, 15

Consolidated Coal v. Dist. 5, United Mine Workers,
336 Pa. Super. 354, 485 A.2d 1118 (1984) 10

Day v. Volkswagenwerk,
318 Pa. Super. 225, 464 A.2d 1313 (1983) 10

Dudley v. USX Corp.,
414 Pa. Super. 160, 606 A.2d 916 (1992) 15

Page

E.E.O.C. v. U.S. Steel Corp.,
921 F.2d 489 (3rd Cir. 1990) 11

Erie R.R. v. Thompkins,
304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938) 16

Fitzpatrick v. Madonna and Outboard Marine Corporation,
424 Pa. Super. 473 , 623 A.2d 845 (1993) 15

Fleck v. KDI Sylvan Pools, Inc.,
981 F.2d 107 (3rd Cir. 1992) 4

Gambocz v.Yelencsics,
468F.2d 837 (3rd Cir. 1972) 11, 12

Haefner v. The County of Lancaster,
543 F. Supp. 264, 265 (E.D. Pa. 1982), aff'd,
707 F.2d 1401 (3rd Cir. 1983) 11

Ham v. Sulek,
422 Pa. Super. 615, 620 A.2d 5 (1993) 10

Hilbert v. Roth,
395 Pa. 270, 149 A.2d 648 (1959) 16

Howell v. Clyde,
533 Pa. 151, 620 A.2d 1107 (1993) 15

In Re: Jones & Laughlin Steel Corp.,
328 Pa. Super. 442, 477 A.2d 527 (1984) 11

Jordon by Jordon v. K-Mart Corp.,
417 Pa. Super. 186, 611 A.2d 1328 (1992) 15

Lance v. Mann,
360 Pa. 26, 28, 60 A.2d 35, 36 (1948) 10

Linde Ent. v. Hazleton City Auth.,
_____ Pa. Super. ___ , 602 A.2d 879 (1992) 17

Lubrizol Corp. v. Exxon Corp.,
929 F.2d 960 (3rd Cir. 1991) 10, 11

Page

Matusky v. Haugh's Pools,
_____ Pa.Super. ____ , 610 A.2d 464 (1992),
appeal dismissed 15

Montana v. United States,
440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979) 10

Napier v. Thirty or More Unidentified Fed. Agents,
855 F.2d 1080 (3rd Cir. 1988) 11

Neustein v. Ins. Placement Facility of Pa.,
271 Pa. Super. 126, 412 A.2d 608 (1979) 17

Philadelphia Elec. Co. v. Borough of Lansdale,
283 Pa. Super. 378, 424 A.2d 514, 519 (1981) 10

Slater v. Slater,
372 Pa. 519, 94 A.2d 750 (1953) 11

Sterling v. Fineman,
428 Pa. Super. 233, 630 A.2d 1224 (1993) 11

Temple v. Synthes Corporation Ltd.,
498 U.S. 5, 111 S. Ct. 315, 112 L.Ed.2d 263 (1990) 8

Thompson v. Karastan Rug Mills,
228 Pa. Super. 260, 323 A.2d 341 (1974) 13, 14

United States v. Athlone Indus., Inc.,
746 F.2d 977 (3rd Cir. 1984) 11

Walton v. Avco Corp.,
530 Pa. 568, 610 A.2d 454 (1992) 9, 10

Federal Rules of Civil Procedure Page

F.R.C.P. 19 ..... 7, 8

F.R.C.P. 19(b) 8

No. 94-484

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

RICHARD FLECK and DIANE FLECK,
Petitioners

v.

HOFFINGER INDUSTRIES, INC.;
DOUGHBOY RECREATIONAL, INC.,
Respondents

v.

KDI SYLVAN POOLS, INC.,a/k/a SYLVAN POOLS;
JAMES HUBERT; POSEIDON POOLS OF AMERICA, INC.;
GIBRALTAR CORP. OF AMERICA, formerly
GIBRALTAR FACTORS CORP.; S & V POOLS, INC.,
Respondents

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STATEMENT OF THE CASE

Petitioners, Richard Fleck and Diane Fleck (hereinafter referred to as "the Flecks"), instituted the within action against the Respondents, Hoffinger Industries, Inc. (hereinafter referred to as "Hoffinger") and Doughboy Recreational, a division of Hoffinger (hereinafter referred to as "Doughboy"), alleging that Petitioner, Richard Fleck, was injured on or about August 8, 1987, when he dove from a wooden deck into an above-ground swimming pool located at the home of James Hubert. The above-ground swimming pool contained a vinyl replacement

liner allegedly manufactured by Hoffinger and Doughboy, which vinyl liner the Flecks allege was defective because it did not contain adequate depth markers, warnings and/or instructions. The within action was originally instituted in the Court of Common Pleas of Philadelphia County on or about August 8, 1989 by filing of a Writ of Summons. The Flecks took no further action whatsoever in this case until they filed a Complaint against Hoffinger and Doughboy on or about July 12, 1991. This case was removed to Federal Court by the Respondents' filing of a Notice of Removal on August 8, 1991.

In Civil Action No. 89-1348 in the United States District Court for the Eastern District of Pennsylvania (hereinafter sometimes referred to as "Fleck I"), the Flecks had instituted an action against Defendants, KDI Sylvan Pools, Inc. a/k/a Sylvan Pools, Muskin, Inc., Nichols Swim Pools, Inc. and James Hubert, based on a strict liability failure to warn theory, arising out of the same incident. The Flecks did not sue Hoffinger and/or Doughboy as a direct defendant in Fleck I. In Fleck I, the Defendant, Nichols Swim Pools, Inc. (hereinafter referred to as "Nichols"), the seller of the replacement swimming pool liner that was in the swimming pool at the time of Richard Fleck's accident, filed a Third Party Complaint against Doughboy Recreational, a Division of Hoffinger Industries, Inc., as the manufacturer of the replacement swimming pool liner, seeking indemnification for all damages which might be awarded in favor of the Flecks against Nichols.

Prior to the trial of Fleck I, Nichols filed a Petition for Bankruptcy under Chapter 11 of the United States Bankruptcy Code. In order to proceed in Fleck I, the Flecks filed a Petition for Relief from the Automatic Stay in Nichols' bankruptcy proceedings. On September 26, 1990, the Bankruptcy Court, on Flecks' Motion, entered its Order terminating the automatic stay, which, by its terms, permitted the Flecks to continue their action against Nichols, but, by agreement of the Flecks, limited any recovery by the Flecks against Nichols to Nichols' available insurance proceeds.

The trial of Fleck I took place before a jury in October, 1990. At the trial of Fleck I, the Flecks' sole theory of liability against Nichols was that the replacement swimming pool liner sold by Nichols was a defective product, because it did not contain any warning signs or depth markers. Counsel for Hoffinger actively defended the product. As found by the District Court in its Opinion, "In fact, Hoffinger's attorney, Robert Korn, Esquire, in the words taken from plaintiffs' motion for summary judgment in this case, 'took the laboring oar of the defense.'" (A-4). At the close of the evidence in Fleck I, counsel for the Flecks made a motion for leave to amend the Plaintiffs' Complaint to allege negligence against Nichols, as well as strict liability, but the trial court denied the Plaintiffs' Motion.

After the trial court in Fleck I denied Flecks' motion for leave to amend their Complaint in order to allege negligence against Nichols, Nichols made a Motion for Directed Verdict with respect to Nichols' third party claim for indemnification against Hoffinger, which Motion was granted by the trial court. Counsel for the Flecks took the position that it was proper for the court to grant Nichols' Motion for Directed Verdict against Hoffinger, agreed that any liability of Nichols as the seller of the replacement swimming pool liner was derivative to the liability of Hoffinger, agreed that the Flecks' case against Nichols was the same case that Nichols had against Hoffinger, and argued to the jury that Nichols and Hoffinger, referred to collectively as the "liner defendants", were directly liable to the Flecks because they manufactured and sold a replacement swimming pool liner which was defective because it did not contain any warnings.

At the conclusion of the trial in Fleck I, the jury found that the replacement swimming pool liner was defective and that the defect was a substantial factor in bringing about the Plaintiffs' harm. The jury returned a verdict in favor of Richard Fleck in the amount of $10,000,000.00 and in favor of Diane Fleck, Richard Fleck's ex-wife, in the amount of $250,000.00. On November 21, 1990, the District Court entered its judg-

ment against Nichols in favor of Richard Fleck in the amount of $11,750,000.00 and in favor of Diane Fleck in the amount of $293,750.00, representing the verdict plus delay damages.

Post-Trial Motions were thereafter filed by Hoffinger and Nichols, seeking a new trial. During the pendency of those Post-Trial Motions, the insurance carrier for Nichols tendered the amount of $2,092,513.00, representing the claimed available proceeds of Nichols' insurance policies plus post-judgment interest to the date of settlement, and the Flecks accepted that tender and entered a partial satisfaction of the judgment in favor of Richard Fleck to the extent of $2,040,200.20, and partial satisfaction of the judgment in favor of Diane Fleck in the amount of $52,312.80.

Hoffinger continued with the Post-Trial Motions, which were denied by the trial court, and which resulted in Hoffinger's filing an appeal to the Third Circuit. On December 4, 1992, the Third Circuit Court issued an Opinion which, among other things, vacated the judgment which had been entered for the Flecks and directed the lower court to mold the jury verdict against Nichols to an amount equal to the insurance proceeds available to Nichols. The Third Circuit also affirmed the lower Court's directed verdict against Hoffinger in Nichols' indemnification action, held that Hoffinger had no legal obligation directly to the Flecks and held that Hoffinger's liability to Nichols was the amount of insurance proceeds available to Nichols. Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107 (3rd Cir. 1992).

Thereafter, Hoffinger filed a Petition for Writ of Certiorari to this Court in Case No. 92-1305, which was denied. Hoffinger thereafter filed a Motion for Entry of Revised Judgment and for Entry of Order Satisfying Revised Judgment, moving the District Court, in accordance with the direction of the Third Circuit, to vacate the original judgment which had been entered in Fleck I on November 21, 1990, to mold the verdict in favor of the Flecks to the amount equal to the insurance proceeds available to Nichols, i.e., $1,999,359.00, to en-

ter judgment in favor of the Flecks against Nichols in the amount of $1,999,359.00, and to enter an Order marking the revised judgment satisfied by virtue of the $2,092,513.00 payment which the Flecks received from Nichols. By Order dated June 9, 1993, the lower Court molded the verdict and entered judgment in favor of the Flecks against Nichols in the amount of $1,999,359.00 ($1,949,375.00 in favor of Richard Fleck and $49,984.00 in favor of Diane Fleck).

Following these events in Fleck I, the Flecks filed a Motion for Summary Judgment in the within action, arguing that, under the doctrine of issue preclusion, the issues of liability and damages have been conclusively determined against Hoffinger, and that Petitioners are entitled to entry of judgment in the within action against Hoffinger in the amount of the jury verdict against Hoffinger in Fleck I, less the amount of money already received by the Flecks from Nichols. The Flecks, in their Motion for Summary Judgment, conceded that Hoffinger and Doughboy were parties to, and were in privity with Nichols, the seller of the replacement pool liner, in Fleck I. The Flecks also agreed that Fleck I and the within action involve the same cause of action. Hoffinger filed an Answer to the Flecks' Motion for Summary Judgment, denying that the doctrine of issue preclusion applies in this case, as the jury's determination of damages and the verdict entered thereon in Fleck I were, in fact, vacated by the Third Circuit and are a nullity.

Hoffinger and Doughboy filed a Motion for Summary Judgment on the grounds that, by reason of the adjudication and revised judgment in Fleck I, the Flecks, by the doctrine of claim preclusion, are barred from relitigating against Hoffinger and Doughboy in the within action the same cause of action and/or the same claims for damages asserted by the Flecks in Fleck I. In addition, and/or in the alternative, the Motion for Summary Judgment averred that the within action against Hoffinger and Doughboy is barred by the full, de facto satisfaction of the revised judgment in favor of the Flecks in Fleck I, as the satisfaction of that judgment, as a matter of law, is

conclusively deemed to be full satisfaction to the Flecks for the damages sustained as a result of the accident of August 8, 1987.

By Order and Opinion dated August 23, 1993, the lower Court vacated a prior Order dated June 14, 1993, denying Hoffinger's and Doughboy's Motion for Summary Judgment, entered judgment in favor of Hoffinger and Doughboy and against the Flecks, and denied the Flecks' Motion for Summary Judgment. The basis for the District Court's decision was that, under the doctrine of claim preclusion, the Flecks were barred from relitigating matters against Hoffinger and Doughboy, parties to, and privies to parties in, Fleck I, based on the same cause of action as in Fleck I and that could have been raised and resolved in Fleck I. (A1-A7).

The Flecks filed an appeal to the Third Circuit of the District Court's Order granting summary judgment in favor of Hoffinger and Doughboy. The Third Circuit affirmed the grant of summary judgment in favor of Hoffinger and Doughboy in its Amended Order entered June 22, 1994. Thereafter, the Flecks filed a Petition for Writ of Certiorari to this Court.

Subsequent to the Third Circuit's June 22, 1994 Order affirming the grant of summary judgment in favor of Hoffinger and Doughboy, Hoffinger and Doughboy filed in the District Court in Fleck I a Motion for Entry of Order Satisfying Judgment, moving the Court to enter an Order marking the judgments in favor of the Flecks against Nichols as satisfied, which Motion is still pending. Although the Flecks have not formally satisfied the judgment in Fleck I, there has been a de facto satisfaction of the final, molded judgment by virtue of the fact that the Flecks have undisputably received all of the money represented by the final, revised judgment, as indicated by their prior partial satisfaction of the original judgment.

SUMMARY OF THE ARGUMENT

The Flecks have mis-stated the issue before this Court as an issue relating to the procedural joinder of parties pursuant to F.R.C.P. 19 and completely ignore the true issue before this Court, that of claim preclusion.

The true issue in this case is whether, having made a deliberate decision not to join Hoffinger and Doughboy in Fleck I, and having proceeded to trial and final judgment in Fleck I, the Flecks are now bound by the claim preclusive effects of the final judgment in Fleck I upon the claims asserted against Hoffinger and Doughboy in this case, which involves the same cause of action as Fleck I, where Hoffinger and Doughboy were both parties to and privies to parties in Fleck I. The Courts below, applying long-standing principles of claim preclusion, properly held that the Flecks are barred from relitigating against Hoffinger and Doughboy in this case the same cause of action and/or the same claims for damages asserted by them in Fleck I.

Although the lower Courts did not address this issue due to their decision of this case based on principles of claim preclusion, the de facto record satisfaction of the revised judgment in Fleck I, entered after an adversary proceeding on the merits, also conclusively bars the Flecks from any further recovery against Hoffinger and Doughboy in this case.

ARGUMENT

I. APPLYING THE DOCTRINE OF CLAIM PRECLUSION, THE COURTS BELOW PROPERLY HELD THAT THE FLECKS, BY VIRTUE OF THE ADJUDICATION AND REVISED JUDGMENT IN FLECK I, ARE BARRED FROM RELITIGATING AGAINST HOFFINGER AND DOUGHBOY IN THE WITHIN ACTION THE SAME CAUSE OF ACTION AND/OR THE SAME CLAIMS FOR DAMAGES ASSERTED BY THE FLECKS IN FLECK I.

The Federal Rules of Civil Procedure regarding joinder, the New Jersey "entire controversy" doctrine and the ruling of this court in Temple v. Synthes Corporation Ltd., 498 U.S. 5, 111 S. Ct. 315, 112 L.Ed.2d 263 (1990), cited by the Flecks as the basis for their Petition for Writ of Certiorari, are irrelevant to this case. In Temple v. Synthes Corporation Ltd., supra, a patient brought an action against a manufacturer of a plate and screw device with screws which broke off inside the patient's back after being implanted by a doctor through surgery. The lower Court had dismissed the suit against the manufacturer, with prejudice, because the plaintiff had failed to join the doctor and the hospital as defendants in the action, citing F.R.C.P. 19(b). The Supreme Court held that, as potential joint tortfeasors with the manufacturer, the doctor and the hospital were merely permissive parties rather than necessary parties under F.R.C.P. 19.

In the instant case, the issue is not whether the Flecks were procedurally compelled to join Hoffinger and Doughboy as direct defendants in Fleck I. Rather as recognized by the Courts below, the issue is whether, having made a deliberate decision not to join Hoffinger and Doughboy in Fleck I, and having proceeded to trial and final judgment in Fleck I, the Flecks are now bound by the claim preclusive effects of the final judgment in Fleck I upon the claims asserted against

Hoffinger and Doughboy in this case, which involves the same cause of action as Fleck I, where Hoffinger and Doughboy were both parties to and privies to parties in Fleck I.[1] In a "permissive joinder" situation, a plaintiff can proceed with an action without adding a "non-essential" defendant, but the plaintiff may nonetheless suffer claim preclusion consequences in appropriate cases should he choose to proceed in that fashion. The Flecks have not argued in their Petition for Writ of Certiorari that the lower Courts misapplied the doctrine of claim preclusion and completely ignore the issue of claim preclusion, which is the controlling issue in this case.

The Flecks' reliance on Walton v. Avco Corp., 530 Pa. 568, 610 A.2d 454 (1992) is similarly misplaced because the issue in that case is completely different from the issue of claim preclusion presented in this case. In Walton v. Avco Corp., supra, the Pennsylvania Supreme Court held, in a single products liability action against the manufacturer of a helicopter and the manufacturer of a defective engine incorporated therein, that the plaintiffs were entitled to recover the helicopter

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[1] The Flecks' assertion that they could not have joined Hoffinger and Doughboy as direct Defendants in Fleck I prior to the running of the statute of limitation is unfounded. The Flecks admit that they knew from Nichols, prior to August 8, 1989, that Hoffinger may have been the manufacturer of the liner. Obviously, the Flecks had enough information to institute suit against Hoffinger and Doughboy prior to the running of the statute of limitations because they filed the within action on August 8, 1989, originally in the Court of Common Pleas of Philadelphia County. If the Flecks had enough information to timely file the action in state court, they could also have timely joined Hoffinger and Doughboy as direct Defendants in Fleck I. In addition, the Flecks had two years to determine the manufacturer of the liner. The Flecks were in possession of the liner, knew that it was distributed by Nichols, and should not be heard to complain that they did not know, before August, 1989, that Hoffinger was the manufacturer.

It is further absurd for the Flecks to suggest that claim preclusion should not apply because Hoffinger and Doughboy could have taken steps to be joined as direct Defendants in Fleck I, such as, for example, by agreeing to waive the statute of limitations, or that Hoffinger and Doughboy could have removed the state court action to Federal Court. Hoffinger and Doughboy had no obligation either to remove the case or to move to consolidate this case with Fleck I.

manufacturer's full pro-rata share of the damages award, after the jury awarded damages against the helicopter manufacturer which were less than the amount of the settlement entered into by the engine manufacturer , where the settlement by the engine manufacturer had not extinguished the liability of the non-settling joint tortfeasor. The holding in Walton v. Avco Corp., supra, is irrelevant to this case, and deals only with a question of potential contribution between suppliers of multiple products associated with a single harm and the question of apportionment by a jury between such multiple suppliers.

Under the doctrine of claim preclusion, a final judgment on the merits by a court of competent jurisdiction bars any future suit between the same parties or their privies on the same cause of action.[2] Montana v. United States, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979); Ham v. Sulek, 422 Pa. Super. 615, 620 A.2d 5 (1993); Bailey v. Harleysville Mut. Ins. Co., 341 Pa. Super. 420, 491 A.2d 888 (1985); Philadelphia Elec. Co. v. Borough of Lansdale, 283 Pa. Super. 378, 424 A.2d 514, 519 (1981); Avins v. Moll, 610 F.Supp. 308 (E.D. Pa 1984), affirmed, 774 F.2d 1150; Consolidated Coal v. Dist. 5, United Mine Workers, 336 Pa. Super. 354, 485 A.2d 1118 (1984); Bearoff v. Bearoff Brothers, Inc., 458 Pa. 494, 327 A.2d 72 (1974); Bruszewski v. United States, 181 F.2d 419 (3rd Cir. 1950), cert. den., 340 U.S. 865, 71 S. Ct. 87, 95 L.Ed. 632 (1950). A future suit is barred because the cause of action has been merged into the judgment. Bailey v. Harleysville Mut. Ins. Co., supra, citing Lance v. Mann, 360 Pa. 26, 28, 60 A.2d 35, 36 (1948); Day v. Volkswagenwerk, 318 Pa. Super. 225, 464 A.2d 1313 (1983).

Claim preclusion applies not only to matters which were actually litigated, but also to those matters which should or could have been litigated in the first adjudication. Allen v. McCurry, 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed. 2d 308

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[2] Federal law and Pennsylvania law on claim preclusion are substantially the same. Lubrizol Corp. v. Exxon Corp., 929 F.2d 960 (3rd Cir. 1991).

(1980); Napier v. Thirty or More Unidentified Fed. Agents, 855 F.2d 1080 (3rd Cir. 1988). Claim preclusion prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding. Brown v. Felsen, 442 U.S. 127, 131, 99 S.Ct. 2205, 2209, 60 L.Ed. 2d 767 (1979).

The three prong test for the application of claim preclusion to a given action requires (1) a final judgment in a court of competent jurisdiction in the earlier case; (2) the assertion of the same cause of action in the two cases at issue, and; (3) the presence of the same parties or their privies in both lawsuits. Avins v. Moll, 610 F. Supp. 308 (E.D.Pa. 1984), affirmed, 774 F.2d 1150, citing Haefner v. The County of Lancaster, 543 F. Supp. 264, 265 (E.D. Pa. 1982), aff'd, 707 F.2d 1401 (3rd Cir. 1983); Napier v. Thirty or More Unidentified Fed. Agents, supra; In Re: Jones & Laughlin Steel Corp., 328 Pa. Super. 442, 477 A.2d 527 (1984); Lubrizol Corp. v. Exxon Corp., 929 F.2d 960 (3rd Cir. 1991), citing, United States v. Athlone Indus., Inc., 746 F.2d 977 (3rd Cir. 1984).

The Pennsylvania Courts, including the Third Circuit, have even broadened the availability of claim preclusion to persons who were not parties to or in "privity" with parties in the earlier case so long as there is a "close", "significant" or "particular" relationship with the defendants in the earlier case. Avins v. Moll, supra; Bruszewski v. United States, supra; Gambocz v. Yelencsics, 468 F.2d 837 (3rd Cir. 1972); E.E.O.C. v. U.S. Steel Corp., 921 F.2d 489 (3rd Cir. 1990); Lubrizol Corp. v. Exxon Corp., supra; Slater v. Slater, 372 Pa. 519, 94 A.2d 750 (1953); Sterling v. Fineman, 428 Pa. Super. 233, 630 A.2d 1224 (1993). As stated by the United States District Court for the Eastern District of Pennsylvania in Avins v. Moll, supra, citing Bruszewski v. United States, supra:

> "That is, where the same plaintiff sues in multiple suits on identical causes of action, defendants in the later suits who were not named

as defendants in the earlier suits are entitled to the benefit of res judicata so long as there is a close or particular relationship with the defendants in the earlier suit:

> Where different plaintiffs sue the same defendants in successive suits, many courts have questioned the fairness of invoking res judicata against the defendant unless a significant relationship can be found between the plaintiffs. But where, as in this case, res judicata is invoked against a plaintiff who has twice asserted essentially the same claim against different defendants, courts have, as indicated in the cases above cited, enlarged the area of res judicata beyond any definable categories of privity between the defendants . . . We are in accord with this development of the law away from formalism which impedes the achievement of fair and desirable results. Bruszewski, 181 F.2d at 422." Id., 610 F. Supp. at 316.

The Third Circuit later reaffirmed Bruszewski, holding, in Gambocz v. Yelencsics, supra, 468 F.2d at 841, that "res judicata may be invoked against a plaintiff who has previously asserted essentially the same claim against different defendants where there is a close or significant relationship between successive defendants." Id., 468 F.2d at 841. It found that, where the first action alleged the existence of a conspiracy involving certain individuals and

> "the sole material change in the later suit was the addition of certain defendants, some of whom had been named in the original complaint as participating in the conspiracy but had not been named as parties defendant at that time . . . the relationship of the additional parties to the second complaint was so close to parties to the first that the second complaint was merely a repetition of the first cause of action and, therefore it is barred by the application of [res judicata]." Id., 468 F.2d at 842.

In the instant case, as properly found by the Courts below, Hoffinger is entitled to the defense of claim preclusion because all of the requirements for application of the doctrine of claim preclusion have been satisfied by the adjudication and entry of a final, revised judgment in Fleck I. As found by the lower Court, the Flecks' allegations against Hoffinger and Doughboy in the within action are the same allegations that they made against Nichols in Fleck I; namely, that the liner was defective, that the defect was a substantial factor causing the accident, and that, as a result thereof, the Flecks suffered damages (A-4). The Flecks do not contest that the within action and Fleck I involve the same cause of action. The cause of action in this case could have been directly raised and resolved against Hoffinger and Doughboy in Fleck I. It is further undisputed that Hoffinger, as a Third-Party Defendant in Fleck I, and as the manufacturer which supplied the swimming pool liner to the Defendant Nichols, the retail supplier of the liner, was both an active party to and privy to a party in Fleck I and availed itself of the opportunity to litigate all the issues in question. Thompson v. Karastan Rug Mills, 228 Pa. Super. 260, 323 A.2d 341 (1974). Accordingly, it is clear under the case law cited above that the defense of claim preclusion is available to Hoffinger as both a party to and/or as privy to a party, i.e. Defendant Nichols, in Fleck I. Thompson v. Karastan Rug

Mills, supra; Avins v. Moll, supra; Bruszewski v. United States, supra.

The Courts below did not apply the New Jersey "entire controversy doctrine", nor did they "change the rules of the game" in order to deprive the Plaintiff of his day in Court against Hoffinger and Doughboy, parties to Fleck I, as argued by the Flecks. (Petition for Writ of Certiorari, pp. 6-7) Rather, the lower Courts properly applied settled principles of claim preclusion which have been existence in the Third Circuit for at least forty (40) years since the Third Circuit's decision in Bruszewski v. United States, supra. As found by the lower Court, the Flecks were prevented from recovering damages against Hoffinger and Doughboy in Fleck I only because of their own conscious procedural strategy (A-6, A-7). The limitation on the Flecks' ability to recover damages against Nichols was the result of an agreement voluntarily entered into between the Flecks and Nichols. The Flecks could have easily avoided the claim preclusion and/or judgment satisfaction consequences of Fleck I by joining Hoffinger and Doughboy as original Defendants in Fleck I and/or by filing the second action in the Eastern District and consolidating the two cases and/or by trying this case first before a jury in the Court of Common Pleas of Philadelphia County, but voluntarily failed to do so.

The Flecks' argument that Richard Fleck is being deprived of the opportunity to obtain "part of the remaining eighty (80%) percent of the damages to which a jury found that he was entitled" (Petition for Writ of Certiorari, p. 7), is entirely misplaced. In so arguing, the Flecks conveniently ignore the essential fact that the Third Circuit vacated the original verdict which had been entered in Fleck I, and directed the District Court to mold the jury verdict against Nichols to an amount equal to the insurance proceeds available to Nichols and to enter that as the verdict in Fleck I, which was done by the District Court by Order dated June 9, 1993. As the jury's original verdict on damages became a nullity, the Flecks could not properly rely on the jury's "actual" determination of damages in

Fleck I in attempting to assert the doctrine of issue preclusion against Hoffinger in the within action. Accordingly, the lower Courts properly denied the Flecks' Motion for Summary Judgment, which was based on the doctrine of issue preclusion. Indeed, in their Petition for Writ of Certiorari, the Flecks do not even contest the denial of their Motion for Summary Judgment.

By virtue of the final adjudication and entry of the revised judgment in Fleck I, the Flecks' cause of action arising out of the diving accident of August 8, 1987 has "merged" into the final judgment, precluding the Flecks from maintaining the within action based upon the identical cause of action as in Fleck I. As noted by the Third Circuit in Bruszewski, no "canon of fairness" requires that the Flecks be given the special advantage of twice trying the same cause of action when they did not so proceed. The issue is not whether or not the Flecks are being "penalized" for failing to join Hoffinger and Doughboy as Defendants in Fleck I, but, rather, whether or not the Court should extricate the Flecks from the legal consequences of strategy decisions which, from the Flecks' point of view, have now gone awry.[3]

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[3] Various decisions rendered subsequent to and around the time of the decision in Fleck I actually raise an issue as to whether or not the issue of liability in Fleck I should have been submitted to the jury. See e.g. Dudley v. USX Corp., 414 Pa. Super. 160, 606 A.2d 916 (1992); Matusky v. Haugh's Pools, __ Pa.Super. __, 610 A.2d 464 (1992), appeal dismissed; Jordon by Jordon v. K-Mart Corp., 417 Pa. Super. 186, 611 A.2d 1328 (1992); Howell v. Clyde, 533 Pa. 151, 620 A.2d 1107 (1993); Fitzpatrick v. Madonna and Outboard Marine Corporation, 424 Pa. Super. 473, 623 A.2d 845 (1993). These cases support the position that, as a matter of law, inadequate warnings were not a substantial contributing cause of the accident and, further, there was no duty to warn Richard Fleck of a known and obvious danger.

II. THE SATISFACTION OF THE REVISED JUDGMENT OBTAINED BY THE FLECKS IN FLECK I AND THE "SINGLE SATISFACTION" RULE BAR THE FLECKS FROM PURSUING THE WITHIN ACTION AGAINST HOFFINGER AND DOUGHBOY.

Although the lower Courts did not address this issue due to their decision of this case based on principles of claim preclusion, the de facto record satisfaction of the revised judgment in Fleck I, entered after an adversary proceeding on the merits, also conclusively bars the Flecks from any further recovery against Hoffinger and Doughboy in this case. It is well-settled under Pennsylvania law that a plaintiff is limited to one satisfaction for a single injury. Brown v. Pittsburgh, 409 Pa. 357, 186 A.2d 399 (1962). The satisfaction of that judgment, as a matter of law, is conclusively deemed to be full satisfaction to the Flecks for the damages sustained as a result of the accident of August 8, 1987.[4] Brandt v. Eagle, 412 Pa. Super. 171, 602 A.2d 1364 (1992), alloc. den., 615 A.2d 1370; Hilbert v. Roth, 395 Pa. 270, 149 A.2d 648 (1959). As satisfaction of the judgment will not have been obtained by fraud or mistake, the Flecks are precluded from challenging the satisfaction by arguing that they have not been fully satisfied with respect to the true value of their claim. Brandt v. Eagle, supra. Having opted not to name Hoffinger and Doughboy as original defendants in Fleck I or to consolidate this action with Fleck I, but, instead, to agree that any verdict in Fleck I would be limited to insurance proceeds available to Nichols, and to, thereafter, accept the tender of $2,092,513.00, representing the available proceeds of Nichols' insurance policies, plus post-judgment interest to the date of settlement, resulting in the de facto

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[4] The judgment satisfaction issue is a substantive issue, which, under Erie R.R. v. Thompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938), mandates application of Pennsylvania law.

record satisfaction of the revised, final judgment in favor of the Flecks in Fleck I, the Flecks must now be forestalled in their subsequent attempts to hold Hoffinger and Doughboy liable for a greater sum in the within action and to try to circumvent the "single satisfaction" rule. Linde Ent. v. Hazleton City Auth., __ Pa. Super. __, 602 A.2d 879 (1992); Neustein v. Ins. Placement Facility of Pa., 271 Pa. Super. 126, 412 A.2d 608 (1979).

CONCLUSION

The Flecks have not presented any special or important reasons why this Court should grant Certiorari to consider the questions raised therein. Rather, the Flecks have mischaracterized the issue in this case as a procedural issue of joinder, whereas the true issue is one of claim preclusion. The Courts below properly rendered their decision based on long-standing principles of claim preclusion and in accordance with the law enunciated by the Supreme Court of Pennsylvania, decisions of the Third Circuit and of other United States Courts of Appeals and decisions of this Honorable Court on the same issue. Therefore, Hoffinger and Doughboy respectfully submit that this Honorable Court should deny the Flecks' Petition for Writ of Certiorari.

Respectfully submitted,

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